IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-30

CHARLES G. COPELIN,

Petitioner,

vs.

STATE OF ALASKA,

Respondent.

RESPONSE OF THE STATE OF ALASKA TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALASKA

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JURISDICTION

Copelin has invoked this Court's jurisdiction under 28 U.S.C. § 1257(3). While Copelin satisfies the requirement of having received a final judgement of the highest state court in which a decision could be had, the State believes that Copelin failed to preserve the Fourteenth Amendment due process issue that he now seeks to have this Court answer. This will be discussed more fully in the Argument portion of the State's response.

QUESTION PRESENTED

When the driver of a motor vehicle is stopped by a police officer because of erratic driving and is asked to perform "field sobriety tests" (tests of physical coordination and mental dexterity) at the site of the stop, must the officer break off his investigative activities when the motorist indicates a desire to talk to an attorney -- similar to the rule enforced in custodial interrogation situations -- or can the officer reiterate his request that the motorist perform the field sobriety tests?

(Because of a dispute between Copelin and the State of Alaska as to the facts of the case, Copelin frames the issue differently. This factual dispute is explained in the statement of the case.)

STATEMENT OF THE CASE

Just before midnight on September 16, 1979, Alaska State Trooper Jeffrey Hall was at the end of his shift and was driving back to the state trooper station on Tudor Road in Anchorage. Looking into his rear-view mirror, Trooper Hall saw a pickup truck behind him swerve from the left-hand lane to the right-hand lane, nearly striking another car and nearly going over the curb at the side of the road. The truck continued its approach and passed Trooper Hall at a speed of 60 m.p.h.; the speed limit on Tudor Road was 50.

Trooper Hall activated his emergency lights and stopped the truck. The driver was the Petitioner, Charles Copelin. Copelin smelled of alcohol. When asked to produce his driver's license, Copelin handed Trooper Hall a VISA charge card. Trooper Hall asked Copelin to get out of the truck; Copelin staggered as he complied with the trooper's request.

At this point, the facts

asserted by Copelin diverge from the facts revealed by the record. Copelin asserts (page 4 of his petition to this Court) that when the state trooper requested that he perform the field sobriety tests, Copelin asked to be allowed to call an attorney first, and that the trooper specifically denied Copelin's request and ordered him to proceed with the field sobriety tests.

But the district court judge who presided over the evidentiary hearing on this question found that the conversation had been slightly different. As Copelin himself stated in his opening brief to the Alaska court of appeals, at page 3:

> The defendant indicated that he wished to telephone his attorney before agreeing to perform any sobriety tests. The defendant's requests were ignored by the trooper and he was instructed to complete the tests.

Copelin reiterated this version of the facts at page 5 of his brief to the court of appeals:

> District court judge Glenn Anderson ... determined, as a factual matter, that the defendant first requested counsel when Trooper Hall instructed him to perform field sobriety tests at the scene of his arrest. He also ruled, however, that Trooper Hall did not verbalize any denial of the defendant's request until after arrival at "C" detachment [the trooper station].

In other words, the hearing judge found that, while Copelin had indeed stated that he wanted to talk to an attorney, the state trooper had not specifically denied Copelin's request. Instead, Trooper Hall merely reiterated his request that Copelin perform the tests, and Copelin proceeded to do so.

Copelin was asked to do three tests: recite the alphabet, count backwards from one hundred, and balance on one leg. Copelin could do none of these things; his speech was slurred and his words and numbers were at times incoherent. (At the hearing, Copelin denied that he had even performed the tests.)

Upon the completion of these tests, Trooper Hall arrested Copelin and took him to the state trooper station. Here, Copelin was asked to take a breath test for determining the level of alcohol in his system, and he was also asked to repeat the field sobriety tests (so that his performance could be videotaped). Copelin again asked to be allowed to call an attorney, and it was at this point that the trooper expressly told Copelin he could not talk to an attorney until after he took the breath test.

Copelin thereupon refused to either take the breath test or to repeat the field sobriety tests; he grew angry and abusive. All of this was videotaped, and a portion of this videotape was played to the jury at Copelin's first trial. See Copelin v State, 659 P.2d 1206 (Alaska 1983), n.6 at 1209.

The Alaska supreme court reversed Copelin's conviction because of the state trooper's refusal to let Copelin call an attorney after he had been arrested and transported to the station. The court's ruling was based on

the provisions of Alaska Statute 12.25.-150(b), which grants an arrestee the right to immediately contact an attorney, a relative, or a friend as a matter of state law.

Copelin's case was remanded for retrial; all the evidence of his intoxication obtained after the police denied his request to telephone his attorney was suppressed. Copelin v State, 659 P.2d at 1215.

At his second trial, Copelin expanded his claim: he filed a motion to have Trooper Hall barred from giving any testimony regarding Copelin's performance of the field sobriety tests at the site of the initial traffic stop. He claimed that he had requested an attorney at this earlier time, and that the trooper had denied his request and ordered him to perform the tests.

As already stated, the judge who heard this motion concluded that, while Copelin had indicated he wanted to phone a lawyer, the state trooper had not told Copelin he was prohibited from calling a lawyer until after the tests.

Instead, the trooper had merely persisted in asking Copelin to perform the tests, and Copelin had then done so.

Copelin was convicted at this retrial, and he appealed to the Alaska court of appeals. Copelin argued that, even though AS 12.25.150(b) was phrased in terms of a citizen's rights following an "arrest", the statute should be interpreted as applying to any custody situation -- specifically, to the type of investigatory traffic stop in Copelin's case.

The court of appeals rejected Copelin's statutory interpretation, holding that the right to telephone an attorney conferred by AS 12.25.150(b) did not take effect until a person had been arrested. Thus the court ruled that, at the initial investigatory stop, Copelin's statement that he wanted to call an attorney did not oblige the state trooper to desist from all efforts to investigate Copelin's level of intoxication until the phone call could be made.

Copelin also argued to the court of appeals that the trooper's

investigatory stop triggered Copelin's right to counsel under the Alaska constitution. Copelin relied on two prior decisions of the Alaska supreme court in which the court had interpreted the "right to counsel" provision of the state constitution as extending broader protection than its federal counterpart. The court of appeals rejected this argument also. Copelin v State (II), 676 P.2d 608 (Alaska App. 1984).

Copelin petitioned the Alaska supreme court to review the decision of the court of appeals. Copelin relied on the same two arguments: that he had a statutory right to immediately contact an attorney under AS 12.25.150(b), and that he had a state constitutional right -- under the Alaska court's previous rulings on the scope of the state constitutional guarantee of right to counsel -- to contact an attorney before the state trooper proceeded with the initial investigatory stop.

The Alaska supreme court denied review, and Copelin has now petitioned this Court for a writ of certiorari to

the Alaska court of appeals, for review of its decision in Copelin (II), 676 P.2d 608 (Alaska App. 1984).

REASONS FOR DENYING THE WRIT

There are three reasons why this Court should not issue a writ of certiorari in this case. First, Copelin has not preserved any issue of federal right in his pleadings before the Alaska courts. Second, the facts upon which he bases his claim are at variance (on a matter of substance) with the findings entered by the hearing judge. Third, Copelin is asking this Court to take the precipitous step of redefining and expanding the federal guarantee of right to counsel in the area of investigative stops when there has been essentially no prior treatment of this issue in either the federal or the state courts.

I. COPELIN HAS NOT PRESERVED ANY ISSUE OF FEDERAL RIGHT UNDER THE FOURTEENTH AMENDMENT

As noted in the Statement of the Case, when Copelin appealed his conviction at the second trial he relied upon two arguments: (1) that Alaska Statute 12.25.150(b) gave him the right

to immediately contact an attorney before the trooper proceeded with the investigatory traffic stop, and (2) that even if the state statute did not apply to investigatory stops, he still had a constitutional right to contact a lawyer.

But an examination of the court of appeals's opinion and of Copelin's subsequent petition for hearing to the Alaska supreme court shows that Copelin was basing this second (constitutional) argument on the Alaska constitutional guarantee of right to counsel, not on the federal guarantee.

In the decision which Copelin seeks to have this Court review, the Alaska court of appeals described the legal issue this way:

> Copelin ... argues that he had a constitutional right to contact counsel before being required to perform field sobriety tests. He relies upon Walker v State, 652 P.2d 88 (Alaska 1982), and Blue v State, 558 P.2d 636 (Alaska 1977).

(Copelin v State (II), 676 P.2d at 609.)

The two cases relied upon by Copelin -- Walker and Blue -- are decisions of the Alaska supreme court in which the state guarantee of right to counsel was interpreted as being broader than the corresponding federal guarantee.

In Blue v State, the Alaska supreme court -- noting that no similar right existed at federal law -- held that an arrestee had a state constitutional right to the presence of an attorney at a pre-indictment lineup. 558 P.2d at 640-643.

In Walker v State, the Alaska supreme court confronted the issue of whether Blue should apply in circumstances where there was a need for a prompt identification. The court again explicitly noted that the question was one of state constitutional law, since no similar right to counsel at a pre-indictment lineup existed at federal law. 652 P.2d at 95-96.

Thus, it appears that Copelin based his arguments to the Alaska court of appeals on a state constitutional theory (because it appeared more promis-

ing than the corresponding argument under federal law).

This view of Copelin's position is substantiated by an examination of his petition for hearing to the Alaska supreme court. (Copelin's petition to the Alaska supreme court is included as Appendix A to the State's response.)

In his petition, Copelin reiterated his two arguments: that he had a statutory right to counsel, and that he had a constitutional right to counsel even if AS 12.25.150(b) did not apply to him.

It is true that, along with references to the right-to-counsel provisions of the Alaska constitution [Art. I, §§ 7 and 11], Copelin included the words "Sixth and Fourteenth Amendments" in his phrasing of the constitutional issue. See Appendix, page A-2. However, when it came time to argue the matter, Copelin relied exclusively on state constitutional grounds:

> The defendant urges the court to find a defendant's statutory right to counsel co-extensive with the collater-

> al constitutional right recognized in Blue v State, 558 P.2d 636 (Alaska 1977).
>
> In Blue, this court extended the constitutional right to counsel in Alaska to the investigatory stage by requiring the presence of a suspect's attorney at pre-indictment lineups, absent exigent circumstances. The defendant in Blue was not formally under arrest when the lineup occurred but the court nevertheless determined that he was "in custody" for purposes of determining his constitutional right to counsel.

(Appendix, pages A-10 & 11)

Here again, just as he did in the court of appeals, Copelin is arguing that, based on the Alaska supreme court's holding in Blue, he was entitled under the Alaska constitution to the presence of counsel at the investigatory traffic stop, even though he had not yet been arrested, much less formally charged with a crime. Copelin is clearly not relying on any federal authority for so broad an assertion of the right to counsel;

Copelin cites no federal cases for his assertion of a "constitutional" right to the presence of an attorney.

A little later in his petition, Copelin again addresses the constitutional guarantee of right to counsel, and again he is plainly relying on the Alaska constitutional guarantee:

> As indicated above, in Blue and Walker this court recognized that a suspect in custody is entitled to counsel at the investigatory stage of a prosecution absent exigent circumstances. ... Consistent with Blue, this court held in Loveless v State, 592 P.2d 1206 (Alaska 1979), that the constitutional right to counsel under the Alaska constitution is to be broadly interpreted "to protect the accused during proceedings that are investigatory in nature and which are conducted in an adversarial context". [592 P.2d] at 1210; citing Blue and Roberts v State, 458 P.2d 340 (Alaska 1969).

(Appendix, pages A-14 & 15)

The Blue and Roberts cases that

Copelin relies upon in this passage are instances in which the Alaska supreme court extended the state guarantee of right to counsel to areas where there was no similar federal guarantee, or where it was uncertain that federal law would grant the suspect similar protection. Blue has already been discussed. In Roberts, the court ruled that a suspect had a state constitutional right to the presence of an attorney when the police took a handwriting exemplar from him.

The only non-Alaska authority cited by Copelin in his petition to the Alaska supreme court is a group of decisions string-cited on page A-19. All of these cases deal with the right to consult an attorney after, not before, an arrest has been made.

In two of the cases -- City of Tacoma v Heater, 409 P.2d 867 (Wash. 1966), and State v Hall, 178 S.E.2d 462 (N.C. 1971) -- the defendants' convictions were reversed because the local police had enforced an arbitrary 4-hour post-arrest ban on any contacts with an

attorney.

In a another of the cases -- Scarborough v State, 261 So.2d 475 (Miss. 1972) -- the defendant's conviction was reversed because the defendant had asked to be allowed to take a chemical test following his arrest and had been refused. The court held that the police could not unreasonably impede the defendant's attempt to gather evidence.

In the last three state court decisions -- Hall v Secretary of State, 231 N.W.2d 396 (Mich. App. 1975), Prideaux v State Dept. of Public Safety, 247 N.W.2d 385 (Minn. 1976), and State v Welch, 376 A.2d 351 (Vt. 1977) -- the courts held that state law, not federal law, mandated that the arrested motorist have the opportunity to contact an attorney before taking a breath test. (The basis of decision in Welch is a little unclear, but was clarified in a later case involving the same defendant: State v Welch, 394 A.2d 1115 (Vt. 1978).)

The final case in this group is a federal district court decision, Heles v South Dakota, 530 F.Supp. 646 (D.S.D.

1982), vacated as moot 682 F.2d 201 (8th Cir. 1982). In this case, when the arrested motorist made his request for an attorney, he was told that such a request constituted a refusal to take the test and was grounds for revoking his driver's license. The arrestee finally contacted his attorney an hour later and, after talking to him, decided to take the breath test, but the police told him it was too late.

The district court first reviewed the state court decisions in this area and found that, of the courts which grant a right to counsel to a driver arrested for drunk driving, all but one had done so on the basis of a state statute or court rule. The district court found that there was essentially no federal law precedent on this subject. 530 F.Supp. at 650-651.

The court proceeded to rule in favor of the motorist, but its ruling was based on the fact that the motorist had been arrested and was thus entitled to an expanded right to consult an attorney, using an anology to the decision in

Miranda v Arizona, 384 U.S. 436 (1966).

In sum, none of the decisions cited by Copelin in his petition to the Alaska supreme court is authority for the federal constitutional claim he now advances to this Court in his petition for writ of certiorari -- that he is entitled to request the presence of an attorney at an investigatory traffic stop prior to any arrest, and that failure of the officer to immediately accede to such a request violates his rights under the due process clause of the Fourteenth Amendment.

All the decisions Copelin relied on in front of the Alaska supreme court either rested on state grounds, or were based on the rights triggered by arrest.

Based on this examination of Copelin's pleadings to the Alaska courts, the State of Alaska believes that Copelin should not be allowed to raise a federal claim to this Court because he failed to raise any such claim to the Alaska courts. While Copelin's petition to the

Alaska supreme court mentions the words "Sixth Amendment" and "Fourteenth Amendment", he failed to cite any authority construing these federal rights in his favor on the question presented -- the asserted pre-arrest right to interrupt an on-the-scene investigatory traffic stop by requesting an attorney.

Instead, Copelin's primary reliance was placed on prior decisions of the Alaska supreme court which construed the right to counsel granted by the Alaska constitution. He apparently made a knowing choice of legal theories, based on his estimate that his best chance of prevailing on the issue of a pre-arrest right to counsel lay in asking the Alaska supreme court to construe its own state constitution.

Under these facts, Copelin should not be allowed to question the Alaskas supreme court's ruling by raising federal grounds that were, as a practical matter, never presented to the Alaska court.

It is Copelin's burden to clearly assert a federal right in front

of the state court. When constitutional rights are at issue, it is Copelin's burden to clearly distinguish between claims under the state constitution as opposed to claims under the federal constitution. New York Central & Hudson River RR Co. v City of New York, 186 U.S. 269 (1902). See also Beck v Washington, 369 U.S. 541 at 549-554 (1962).

Copelin has failed to meet these burdens, and his petition should be dismissed for this reason.

II. COPELIN'S CLAIM THAT HE WAS "DENIED" THE RIGHT TO CONTACT AN ATTORNEY AT THE INVESTIGATORY STOP IS BASED ON A DUBIOUS CHARACTERIZATION OF THE FACTS FOUND BY THE HEARING JUDGE

Although Copelin claims that, during the traffic stop, he asked to contact an attorney and was denied this opportunity, the facts found by the hearing judge are a little different. As Copelin stated in his petition for hearing to the Alaska supreme court:

> [Judge Anderson] determined, as a factual matter, that Mr. Copelin first requested counsel when Trooper Hall instructed him to perform field sobriety tests at the scene of his arrest. He also ruled, however, that Trooper Hall did not verbalize any denial to the defendant's request until after their arrival at trooper headquarters. The court concluded that [the] denial of Mr. Copelin's right to counsel was not "effective" until after his arrival at trooper headquarters where a telephone would have been available to implement his right to contact

an attorney.

(Page A ----)

It thus appears, from Copelin's own recital of the facts, that while he might have mentioned his desire to contact an attorney when he was stopped, he did not voice objection to taking the field sobriety tests without first talking to his lawyer. Instead, the real confrontation over this issue occurred after Copelin had been arrested and taken to the station. There, as recited in Copelin v State (I), 659 P.2d 1206 at 1208-1209, Copelin insisted on talking to a lawyer before submitting to any further field sobriety tests or any breath test. When his request to telephone a lawyer was denied, Copelin grew angry and refused to submit to any tests.

The factual predicate for Copelin's due process claim is that, at the scene of the investigatory stop, he told the trooper he wanted to contact an attorney before performing any field sobriety tests, and the trooper flatly refused this request and directed Copelin

to proceed with the field sobriety tests. This characterization of the encounter between Copelin and Trooper Hall does not comport with the facts as found by the hearing judge. Instead, it appears that Copelin made no direct demand to see an attorney before proceeding any further, Trooper Hall did not directly refuse to allow Copelin to contact an attorney at the scene of the traffic stop, and Copelin voluntarily decided to submit to the field sobriety tests.

For this reason, the petition for certiorari should be denied.

III. COPELIN'S CLAIM IS ONE OF FIRST IMPRESSION UNDER FEDERAL LAW, AND THIS COURT SHOULD DEFER CONSIDERATION OF IT UNTIL LOWER COURTS HAVE HAD A CHANCE TO DEAL WITH IT

In his petition to this Court, Copelin relies on a handful of state court decisions for his claim that he had a right to consult an attorney before performing the field sobriety tests at the pre-arrest traffic stop. With one exception, these are the same cases that Copelin relied upon in his petition to the Alaska supreme court. And, as discussed in section I of the State's argument, these cases are not particularly on point.

(Copelin cites one new case in his petition to this Court: Smith v Cada, 562 P.2d 390 (Ariz. App. 1977). In that case, following his arrest for drunk driving, the defendant attempted to secure his release on bail so he could obtain a blood test; but, in contravention of a state statute, the police held the defendant incommunicado and did not

allow him to post bail even though he had the requisite cash with him.

Copelin cites no federal cases for his proposition that, during an investigative traffic stop, before any arrest, a police officer must cease his questioning (or in this case his request that the motorist perform field sobriety tests) at any time the motorist indicates a desire to talk to an attorney.

A ruling in Copelin's favor would have a major impact not only on traffic stops but also on other situations where police officers pursue investigative inquiries addressed to suspects who are not in custody for Miranda purposes -- situations such as seeking consent for a search of luggage or other personal possessions, or asking a person to explain his presence at a particular place or his possession of a particular article of property.

Before tackling such a modification of the law of investigatory stops, the Court should wait for lower courts to address the problem and try their hand at identifying and weighing the various

policy interests at stake.

CONCLUSION

Copelin's petition for writ of certiorari should be denied.

Respectfully submitted this 15th day of October, 1984.

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ATTORNEY GENERAL OF THE
STATE OF ALASKA

By: David Mannheimer
David Mannheimer
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APPENDIX

PERTINENT PORTIONS OF COPELIN'S PETITION FOR HEARING TO THE ALASKA SUPREME COURT

I. Prayer for Review.

COMES NOW the defendant, CHARLES G. COPELIN, by and through his attorneys, Birch, Horton, Bittner, Pestinger and Anderson, and, pursuant to the provisions of AS 22.07.030 and Rule 302(a) of the Alaska Rules of Appellate Procedure, hereby requests a review of Opinion No. 343 of the Court of Appeals of the State of Alaska, dated February 17, 1984, (hereinafter referred to as "Copelin III") wherein the court affirmed the defendant's District Court conviction for operating a motor vehicle while intoxicated. ...

II. Statement of Issues.

A motorist suspected of drunk driving is stopped by a State Trooper and instructed to exit his vehicle. The motorist complies and is directed by the

Trooper to perform various field sobriety tests as a means of determining the extent of his alcohol impairment. The motorist requests an opportunity to telephone his attorney before performing any sobriety tests. The request is denied. The tests are performed and the results are later used against the motorist at his drunk driving trial. The following issues are presented:

1. Did the trooper's actions deny the motorist's statutory right to contact counsel, guaranteed by AS 12.25.150 and Copelin v. State, 659 P.2d 1206 (Alaska 1983)?

2. Did the trooper's actions deny the motorist's constitutional right to contact counsel, guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution and Art. I, §§ 7 and 11 of the Alaska Constitution?

3. Assuming a statutory or constitutional violation, should the results of the field sobriety tests have been suppressed?

III. Statement of Facts

This petition stems from an OMVI conviction occurring on remand after the defendant's successful appeal in Copelin v. State, 659 P.2d 1206 (Alaska 1983) (hereinafter referred to as Copelin II). This case was also the subject of the Court of Appeals Opinion in Copelin v. State, 635 P.2d 492 (Alaska App. 1981) (hereinafter referred to as Copelin I.) The facts are largely undisputed.

On the evening of September 16, 1979, Charles Copelin was stopped on Tudor Road in Anchorage by Trooper Jeffrey Hall who suspected he was driving while intoxicated. Trooper Hall spoke briefly with Mr. Copelin and then directed him to exist his vehicle in order to perform field sobriety tests. Mr. Copelin complied and accompanied Trooper Hall to an area between the two vehicles (Copelin's and Hall's). Upon being directed by Trooper Hall to perform various sobriety tests, Mr. Copelin stated that he wished to telephone his

attorney before participating in any testing. Trooper Hall denied the request and again instructed Mr. Copelin to perform the tests. According to Trooper Hall, Mr. Copelin then performed all of the required tests. Trooper Hall recalls that Mr. Copelin's performance of the tests was unsatisfactory. (Mr. Copelin denies that he took the tests after making his request for counsel.) (T. 1, S. 1, Log 45-65; T. 1, S. 2, Log 454-660; T. 2, S. 1, Log 144-200.)

After completion of the sobriety tests, Mr. Copelin was formally arrested and transported to Trooper Headquarters where he was again instructed to perform field sobriety tests (this time, before a videotape camera) and was also requested to submit to a breathalyzer analysis. Mr. Copelin made numerous requests to Trooper Hall that he be permitted to contact his attorney, all of which were denied. He then refused a breathalyzer test, refused to perform any additional field sobriety tests and was later formally charged with violating the State's drunken driving laws. (Video-

tape; R. 1.)

On October 15, 1979, Mr. Copelin moved on several grounds to suppress any videotapes of his actions filmed by the State after his arrest. His primary contention was that any evidence gathered after Trooper Hall had refused his request to contact counsel was inadmissible. (R. 10-19.) Then District Court Judge Beverly Cutler denied the motion and permitted the showing of the entire videotape to the jury. However, she ordered that the volume on the videotape be turned off during portions of the tape depicting interrogation questions and references to Mr. Copelin's refusal to submit to a breathalyzer analysis. (Copelin II at 1209; n.6.)

On November 14, 1979, the case proceeded to trial before District Court Judge John Mason and on the following day the jury returned a verdict of guilty. (R. 96.) An appeal was made to the Superior Court and on June 26, 1983, Superior Court Judge Ralph Moody affirmed the conviction. (R. 164.) Judge Moody's decision was appealed to this court which

later transferred the case to the Court of Appeals. The Court of Appeals affirmed the conviction in Copelin I and a Petition for Hearing was thereafter filed with this court. This court accepted the petition and reversed the conviction in Copelin II on February 18, 1983. (R. 165-206.) The case was thereafter remanded to the District Court and the State elected to retry it.

Upon remand, Mr. Copelin moved the District Court to suppress all evidence gathered by the State after the denial of his first request for counsel, made at the scene of his arrest. (Mr. Copelin's 1979 motion to suppress had been directed principally towards the station house videotape.) (R. 210-214.) The State filed no Opposition to the motion and did not present any testimony at the June 17, 1983 evidentiary hearing.

District Court Judge Glen Anderson granted the motion in part. He determined, as a factual matter, that Mr. Copelin first requested counsel when Trooper Hall instructed him to perform field sobriety tests at the scene of his

arrest. He also ruled, however, that Trooper Hall did not verbalize any denial to the defendant's request until after their arrival at Trooper Headquarters. The court concluded that denial of Mr. Copelin's right to counsel was not "effective" until after his arrival at Trooper Headquarters where a telephone would have been available to implement his right to contact an attorney. (T. 1, S. 2, Log 34-126.)

As a result of the District Court's ruling, all evidence gathered by the State subsequent to Mr. Copelin's arrival at Trooper Headquarters was suppressed. All other evidence, including the officer's testimony concerning Mr. Copelin's performance of field sobriety tests after his invocation of right to counsel at the scene, was deemed admissible. The case proceeded to trial before District Court Judge William H. Fuld on July 6 and 7, 1983. The State's case in chief included the testimony of Trooper Hall concerning Mr. Copelin's purportedly poor performance on field sobriety tests taken at the scene of the

arrest. (T. 2, S. 1, Log 114-200.) The jury entered a verdict of guilty on July 7, 1983 and Mr. Copelin was sentenced by Judge Fuld to sixty (60) days imprisonment, with fifty (50) days suspended, a $500 fine and a one (1) year operator's license revocation.

An appeal was prosecuted to the Alaska Court of Appeals which affirmed the conviction on February 17, 1984. Copelin III. Relying upon Copelin II and Anchorage v. Geber, 592 P.2d 1187 (Alaska 1979), the court held that Mr. Copelin's statutory right to counsel did not attach until he was formally arrested. Since his first request for counsel and the subsequent field sobriety tests occurred prior to formal arrest, the court concluded that his statutory right to counsel was not violated. Relying upon Svedlund v. Anchorage, 671 P.2d 378 (Alaska App. 1983), the court also held that a motorist has no constitutional right to contact counsel prior to field sobriety tests or breathalyzer examinations.

IV. Points and Authorities

A. Statutory Right to Counsel

In Copelin II, this court recognized that a motorist arrested for drunk driving is entitled under AS 12.25.150(b) and Alaska Criminal Rule 5(b) to a reasonable opportunity to contact his attorney before deciding whether to perform sobriety tests. Id. at 1208, 1215, AS 12.25.150(b) provides in pertinent part:

> Immediately after an arrest, a prisoner shall have the right to telephone or otherwise communicate with his attorney and any relative or friend, and any attorney at law entitled to practice in the courts of Alaska shall, at the request of the prisoner, have the right to immediately visit the person arrested.

Alaska Criminal Rule 5(b) provides:

> Rights of prisoner to communicate with attorney or other person. Immediately after his arrest, the prisoner shall have the right forthwith to telephone or otherwise to

> communicate with both his attorney and any relative or friend. Any attorney at law entitled to practice in the courts of Alaska, at the request of either the prisoner or any relative or friend of the prisoner, shall have the right forthwith to visit the prisoner in private.

The State argued below, and the Court of Appeals agreed, that a motorist's statutory right to counsel is not implemented until after a formal arrest has occurred. The defendant disagrees and submits that the term "arrest" as used in the above statute and rule should be interpreted to mean "in custody". Since it is undisputed that Mr. Copelin was in a custodial setting when he requested counsel, his right to telephone counsel was properly triggered under the statute and rule.

The defendant urges the court to find a defendant's statutory right to counsel co-extensive with the collateral constitutional right recognized in Blue v. State, 558 P.2d 636 (Alaska 1977).

In Blue, this court extended

the constitutional right to counsel in Alaska to the investigatory stage by requiring the presence of a suspect's attorney at pre-indictment line-ups, absent exigent circumstances. The defendant in Blue was not formally under arrest when the line up occurred but the court nevertheless determined that he was "in custody" for purposes of determining his constitutional right to counsel. Note the following language on page 642 of the Opinion:

> In balancing the need for prompt investigation against a suspect's right to fair procedures, we hold that a suspect who is in custody is entitled to have counsel present at a pre-indictment line-up unless exigent circumstances exist so that providing counsel would unduly interfere with a prompt and purposeful investigation. [Id. at 642; emphasis added.]

This language was explained in footnote 9 to the Opinion, which reads:

> Blue, although not formally under arrest, was in custody in that he was detained and not at liberty to leave. [cit.om.]

[Id. at 642.]

This language in Blue was recently reaffirmed by this court in Walker v. Alaska, 652 P.2d 88 (Alaska 1982). Note the following language on page 96 of the Opinion:

> Although at the time of the identification Walker was not formally under arrest, he was "in custody in that he was detained and not at liberty to leave." [citing Blue with approval.]

In the present case, Trooper Hall testified that he observed Mr. Copelin driving his car erratically. Upon stopping the vehicle, Hall observed that Mr. Copelin had blood shot eyes, slurred speech, and emitted a strong odor of alcohol. When asked for his operator's license, Mr. Copelin purportedly presented his VISA card. When Mr. Copelin exited his vehicle upon instructions from Trooper Hall, he purportedly stumbled directly into the traffic lane of Tudor Road. (T. 1, S. 2, Log 454-660.] Clearly at that point, Mr. Cope-

lin, like the defendants in Blue and Walker was not free to leave the trooper's presence and control and, accordingly, was "in custody".

The distinction drawn by the State and the Court of Appeals between "custody" and "arrest" in determining a motorist's statutory right to counsel, promotes form over substance. For example, in the present case, a motorist in custody, unequivocally expressed his desire to communicate with counsel prior to participating in any sobriety testing. The request was denied and the motorist was forced to perform the tests without the aid of telephone advice from his attorney. The fact that the officer had not yet stated "you are under arrest" should not affect whether the right to a telephone call existed at that point.

The clear legislative intent behind the statute is to provide suspects in custody with telephone access to counsel. Following the Court of Appeals approach, allowing telephone access only after a formal arrest, will encourage police officers to frustrate this legis-

lative intent by engaging in a game of semantics with the suspect--delaying formal arrest as long as possible in order to thwart the suspect's desire to telephone his attorney.

B. Constitutional Right to Contact Counsel.

As indicated above, in Blue and Walker this court recognized that a suspect in custody is entitled to counsel at the investigatory stage of a prosecution absent exigent circumstances. Of particular relevance to this case, is the language at footnote 12 to Blue recognizing that even where exigent circumstances exist, if the suspect requests an attorney, "he should be provided an opportunity to call one." Id. at 643. Consistent with Blue, this court held in Loveless v. State, 592 P.2d 1206 (Alaska 1979), that the constitutional right to counsel under the Alaska Constitution is to be broadly interpreted "to protect the accused during proceedings that are investigatory in nature and which are conducted in an adversary context." Id.

at 1210; citing Blue and Roberts v. State, 558 P.2d 636 (Alaska 1969).

The Court of Appeals rejected the defendant's argument that Blue was controlling, relying principally upon Svedlund v. Anchorage, supra. In Svedlund, the defendant argued that there was a constitutional right to contact an attorney prior to deciding whether or not to submit to a breathalyzer test. Citing Anchorage v. Geber, 592 P.2d 1187 (Alaska 1979), the court determined that a breathalyzer exam is not a "critical stage" at which the Alaska and Federal Constitutions require counsel's presence. Id. at 382.) The Svedlund court emphasized several times that the defendant had not requested to telephone his attorney and that the police had not interfered with any attempt by him to obtain counsel. Id.

In Geber, this court held that a motorist need not be advised of his right to counsel prior to sobriety testing. Id. at 1192. As in Svedlund, the defendant in Geber had not requested an opportunity to contact counsel.

The present case is distinguishable from Svedlund and Geber in one important respect: Mr. Copelin did request an opportunity to contact counsel. The importance of this distinction was noted by this court at footnote 12 of Copelin II, which reads in pertinent part:

> While we held [in Geber] that the police have no duty to advise a suspect of any right to counsel, we did not hold that the police may refuse the specific requests to contact counsel that were made in the instant cases. Other courts have recognized that there is a vast difference between a flat refusal to afford access to counsel after it is requested and a failure to advise or warn a defendant of his rights. [cit.om.] Secondly, while we held in Geber that there is no right to have an attorney present at the field sobriety tests, we did not hold that there was no right merely to contact or communicate with counsel before deciding whether or not to submit to such tests. [Id. at 1211.]

Implicit in the emphasized language is that while a motorist has no constitutional right to have counsel present at sobriety testing, there is a right to attempt to contact private counsel by telephone upon request. Indeed, the Court of Appeals recognized in Yerrington v. Anchorage, _____ P.2d _____ (Alaska App. 1983) (Slip Op. No. 326; December 30, 1983), that Copelin II had limited Geber to its facts. Note the following excerpt from page 4 of the Slip Opinion:

> Second, Copelin disapproved a practice arguably sanctioned by three prior decisions of the Alaska Supreme Court: Graham v. State, 633 P.2d 211, 215, 217 (Alaska 1981)...Palmer v. State, 604 P.2d 1106, 1110 (Alaska 1979)...and Anchorage v. Gebber, 592 P.2d 1187, 1188 (Alaska 1979) (the court held that the police have no duty to advise a suspect of any right to counsel before administering field sobriety tests and further held that a drunk driving suspect had no right to have an attorney present at field sobriety test.)

The defendant is not suggesting that the State be required to provide counsel to a motorist in custody under all circumstances; or that the defendant has a right to counsel's presence at all times during the investigatory stage of a prosecution; or even that the State is required to advise a defendant of a right to counsel during sobriety testing. Rather, he is merely positing that if a motorist already has his own counsel and indicates to the officer his desire to communicate with him, the police officer should not prevent him from doing so. As this court and others courts have recognized, there is a "vast difference between a flat refusal to afford access to counsel after it is requested and a failure to advise or warn a defendant of his rights." Copelin II at 1211, n. 12, quoting from People v. Craft, 270 N.E.2d 297, 300 (N.Y. 1971). A number of cases from other jurisdictions have recognized that once a motorist requests an opportunity to confer with counsel prior to sobriety testing, he must be given an opportunity to do so. These courts have

used either a traditional Sixth Amendment/Right to Counsel analysis or a Fourteenth Amendment/Due Process rationale. See e.g., City of Tacoma v. Heater, 409 P.2d 1867 (Wa. 1966); State v. Welch, 376 A.2d 351 (Vt. 1977); State v. Hill, 178 S.E.2d 462 (N.C. 1971) Prideaux v. State, 247 N.W.2d 385 (Minn. 1976) (dicta); Hall v. Secretary of State, 261 So.2d 475 (Miss, 1972); Heles v. State of South Dakota, 530 F. Supp. 646 (D.S.D. 1982), vac. as moot, 682 F.2d 201.

Mr. Copelin urges this court to follow these cases and hold that once a motorist in custody has requested an opportunity to contact his attorney, all sobriety testing should cease for a limited period of time to provide him a reasonable opportunity to telephone his attorney. If no contact can be made within that reasonable time, the motorist will have to make the decision whether to perform the testing on his own.

C. Remedy

. . .

[The remainder of Copelin's petition for hearing, dealing with the proper remedy for the asserted violation of law, and the reasons why the Alaska supreme court should exercise its discretionary jurisdiction in Copelin's case, is omitted.]